

# Constitutional Constraints meet Political Pressure

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Päivi Leino-Sandberg

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The Finnish Constitutional Law Committee had already in April adopted a critical position towards the COVID 19 crisis measures in the EU. Last week the Committee continued its critical examination. It came to the conclusion that the [Eurogroup decision](#) to essentially remove all conditionality from the new loan facility of the European Stability Mechanism (ESM) is incompatible with the Finnish Constitution and expressed serious doubts about its compatibility with EU law. The Committee also repeated its concerns about the accumulation of financial risks deriving from EU membership.

The Committee assessed three measures: the new Pandemic Crisis Support facility of the ESM, the [Commission's new SURE proposal](#) establishing a facility that offers Member States loans for supporting short-term work schemes and the European Investment Bank Group's proposal to establish a Pan European Guarantee Fund. The Finnish Parliament views all three proposals primarily as measures of solidarity: not directly useful for Finland, but acceptable for the benefit of others, within certain constitutional limits.

## Parliament in the driving seat

[The Finnish Constitution](#) grants the Parliament a central role in EU matters. The Government cannot express a political position in EU negotiations before the Parliament has reviewed its proposal. Within the Parliament, the ultimate competence to issue EU mandates rests with its Grand Committee, to which the Constitutional Law Committee and other specialized committees report. However, in constitutional matters, the statements of the Constitutional Law Committee constitute binding instructions for the Government – something the Grand Committee emphasised on Friday when providing the Finance Minister with [a mandate](#) for the Eurogroup.

Procedurally, the obligation to receive a mandate from the Parliament *ex ante* works well with the Union's normal legislative agenda, but less so in the present situation, where the crisis measures are being rammed through at breakneck speed. A system building on intensive parliamentary scrutiny sits particularly ill together with the Eurogroup's irregular, unpredictable operating model.

The Eurogroup working model appears almost designed to maximize the power of the executive and prevent proper parliamentary scrutiny. Documents arrive very late, days or even hours before the meeting, making timely parliamentary consultations practically impossible. Lately, documents from the government have routinely become available to the Parliament in the late afternoon of the day before the

Eurogroup meeting. Constitutional experts will then analyze them through the night, submitting their assessment in the small hours of the morning for the Constitutional Law Committee members to study before the formal Committee meeting convenes at 8 am. That leaves a couple of hours to debate the constitutional dimensions of the matter and prepare the statement for the Grand Committee.

Such a working model may be the way to get things done, but it is not conducive to better democratic scrutiny and the legitimacy of the EU measures.

## **SURE and COVID 19 Fund**

The Commission's SURE proposal and the EIB's new COVID-19 Fund both fall under EU competence and are decided by qualified majority. In this kind of setup, a small state can usually afford to be difficult sometimes, but not too much and not too often.

However, these measures rely for their funding on state guarantees which fall under national competence. In Finland, state guarantees are the prerogative of the Parliament and entail a specific parliamentary approval procedure. When entering a guarantee arrangement, a precise quantification of the ensuing obligations is a constitutional necessity. For the COVID 19 Fund, this requirement is now met, in the sense that there is a clear ceiling to the liability. Building on its earlier practice with the ESM, the Committee emphasizes that, even beneath this ceiling, the likelihood of the risks materializing and the Parliament's involvement in risk-management decisions are constitutionally relevant as well. In this context, the risks are unclear but presumed very high. Finland's ability to influence the operational decisions that largely determine the risk exposure is minimal. From a constitutional point of view, and in view of the substantial risks involved, the Committee considers it preferable for Finland not to participate in the guarantees before there is more clarity of the extent of the overall risks involved in the already proposed and soon forthcoming measures.

Similarly, in the context of the SURE proposal, the Committee accepts that the Government was now in a position to provide an exact upper limit for the state guarantee. However, it observed that, since also the margin of the EU budget could be used to finance the fund, the risks stemming from the program would not be limited to the guarantee commitment, but would partly be carried through Finland's EU membership obligations. The exact extent to which any losses of the program could be covered from the EU budget, without having to resort to the guarantees, seemed unclear, and there was as yet no knowledge of the new MFF. These considerations are also highly relevant for the envisaged EU Recovery Fund.

The Committee continues to take a critical view of the way the SURE Regulation is drafted so as to make state guarantees technically voluntary but in practice compulsory. Since they fall under national competence, participation in the guarantees should not be legally or politically compulsory. Hence the Regulation should be redrafted to allow it becoming operational among those Member States

that provide guarantees. However, since the risks involved were now clearly defined the Committee sees no direct constitutional obstacles to the SURE proposal.

The Committee concluded its consideration of both proposals stressing that its examination has been hampered by the lack of a holistic evaluation of all the financial obligations, new and expected, arising from COVID-19 related measures, at the national and EU level. The Committee requires that government memoranda will henceforth contain such an evaluation.

## **ESM conditionality**

Politically the most charged issue on the Committee's agenda concerned the proposal to allow Member States to access the ESM's precautionary Enhanced Conditions Credit Line (ECCL) essentially without conditionality. The Committee had not previously specifically considered the extent and nature of conditionality that ESM financial support requires.

Much of the Committee's EMU-related interpretative practice derives from the ESM context. It has consistently – and successfully – insisted on safeguarding the Parliament's budgetary sovereignty through unanimous decision making. Therefore, in contrast to the two EU measures discussed above, with the ESM facility the Parliament has the power of veto.

Until now, strict conditionality (explicitly mentioned in Article 136(3) TFEU) has been considered an inseparable part of the legal framework governing the terms of ESM financial support. The COVID-19 crisis changed that. While there are obvious economic reasons why some countries were better prepared to face the consequences of the lockdown, the immediate trigger of the crisis was non-economic. Requiring a country making use of the facility to commit to a full macroeconomic adjustment programme and enhanced surveillance under [Regulation No 472/2013](#) seemed to many countries politically inappropriate. [Some countries](#) were clear that they would not accept a facility that includes *any* kind of conditionality.

The Committee started its discussions on conditionality before the April Eurogroup. At that time, it indicated that the plan of abandoning conditionality seemed inconsistent with the key provisions of the ESM Treaty. Conditionality was a constitutional matter, necessary to safeguard the functionality of the ESM and its funding capacity. It mattered for budgetary sovereignty.

What discussions took place in the two Eurogroup video conferences of early April is not known. The [outcome](#) was that the 'only requirement to access the credit line will be that euro area Member States requesting support would commit to use this credit line to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID 19'. The word 'conditionality' was nowhere to be found. That Finland joined the consensus in support of such an interpretation seems difficult to reconcile with the clear position of the Constitutional Law Committee.

A month later, in morning of 8 May, the Constitutional Law Committee convened to consider a Government memorandum, laying out the issues before the Eurogroup the same afternoon. It concluded, in line with its earlier statement, that it was constitutionally necessary that Finland supports and only accepts ESM facilities that are based on conditionality. It then proceeded to explain what conditionality means with reference to Articles 3 and 13(3) of the [ESM Treaty](#). The former refers to 'strict conditionality', the latter requires that the relevant Memorandum of Understanding to be used 'shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned'. The Committee also quoted the *Pringle* ruling, according to which 'the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States' economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy'.

The Constitutional Law Committee's perspective is constitutional, and it tends to stress that the final and exclusive arbiter of EU law is the CJEU. However, in this context the Committee went unusually far. It expressed a view that the way in which the PCS had been formulated entailed great uncertainties from the viewpoint of EU law, and obligated the Government to ensure that ESM support will include conditionality consistent with the ESM Treaty and the relevant jurisprudence.

Ensuring this was, of course, impossible within the few hours left before the Eurogroup was to give its final endorsement.

## **'Exception to the binding provisions of EU Treaties'**

The Grand Committee then faced a difficult task of dealing with a minister who had already accepted a deal that was difficult to reconcile with the mandate given by the Parliament four weeks earlier. It could have ordered the minister reverse that agreement and announce that Finland will use its veto.

Following a long debate and a vote, the Grand Committee adopted a convoluted statement that leaves plenty of room for interpretation. The Committee first raises the point of the Constitutional Law Committee's constitutional evaluations which 'constitute binding instructions for the government'. It argues that Finland needs to be prepared to consider temporary and limited measures that have unanimous support of other states, provided they are vital for securing public sector funding and financial stability. Finland cannot approve measures that endanger the country's budgetary sovereignty or public finances. However, exceptional circumstances cannot be used as an excuse to undermine each Member State's responsibility for its economic policy or to create joint debt.

Remarkably, the Grand Committee finally recalled that the measures will create 'an exception to the binding provisions of EU Treaties'. This means they have to be temporary, vital, and build on sufficient conditionality both as regards the

purpose of the funds and the ‘standing of the debtor’, which presumably refers to the sustainability of its public finances.

Hence, the Grand Committee left it for the minister to navigate the path between the Constitutional Law Committee’s ‘binding instructions’ and its own tacit acceptance of ‘exception to the binding provisions of EU Treaties’.

Later the same evening the minister joined the rest of the Eurogroup in [endorsing](#) the final elements of the deal. There was no trace of conditionality in the documentation.

To the extent the Grand Committee mandated *ex post* the Minister to conclude the deal, this was done on political grounds only. Both Committees were convinced that the deal was exceptionally problematic from a legal point of view.

The legal and political consequences of this decision in the Finnish constitutional system are yet to be discovered, as are the broader consequences of this newfound flexibility for EU law. Whether the role and application of conditionality in ESM programs is a matter for law or political convenience has implications for the EU constitutional order.

*The author was one of the experts consulted by the Constitutional Law Committee.*

